

February 11, 2002

Mr. Kenneth Feinberg
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By Fax: 212-527-9611
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Re: September 11 Victim Compensation Fund of 2001: Unpaid Work of Full-Time Workers As Economic Loss

Dear Mr. Feinberg:

Thank you again for meeting with us to discuss our concerns about the September 11 Victim Fund of 2001 (“the Fund”). At your request, NOW Legal Defense and Education Fund (“NOW Legal Defense”) offers this memorandum to discuss and support our view that the Fund must compensate all claimants for the loss of their loved one’s unpaid work, including survivors of full-time workers.¹ We initially raised this concern in our public comments filed with the Department of Justice on January 22, 2002, and spoke with you about it at our meeting of February 3, 2002. We are joined in this memorandum by Professor Joan Williams, Executive Director of the Program on Gender, Work and Family at the Washington College of Law, American University.

¹ The Fund was created pursuant to Title IV of the Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2001). Our discussion will concern only the Fund’s calculation of the economic losses of victims killed by the terrorist attacks, not persons physically injured, who are also eligible for Fund compensation. To the extent that physically injured claimants cannot perform unpaid work (see discussion *infra*), we believe that compensation for the loss of this work should be available.

Unpaid work has long been quantified and assigned value in wrongful death litigation, where it is routinely compensated as an economic loss.² The claimants of the Fund cannot be fully compensated unless they eligible for and receive the real value of the September 11th victims' work--paid *and* unpaid.³ Ignoring the unpaid work performed by full-time workers raises sex-discrimination concerns because women victims, especially mothers, are much more likely to have expended significant time on unpaid work. Because the Fund has already indicated that it will assign value to the lost replacement services of some claimants, to fairly compensate full-time workers it need only extend whatever valuation approach it takes to these additional claimants. By giving value to all of the work performed by full-time working women and men, the Fund will ensure that the compensation scheme reflects America's commitment to fairness and equality, and fulfills its legal mandate of compassionately providing "fair, predictable and consistent compensation" in a manner "that is just and appropriate in light of claimants individual circumstances."⁴

² For a discussion of the meaning of nonmarket work, see, e.g., Robert Eisner, *Extended Accounts for National Income and Product*, 26 J. of Econ. Lit. 1611, 1613, 1620-23 (Dec. 1988) (citing accounts which typically include housework and child care). See also Joke Swiebel, *Unpaid Work and Policy-Making: Towards a Broader Perspective of Work and Employment*, DESA Discussion Paper No. 4, at 1 (United Nations, Feb. 1999) (unpaid work defined as "all productive activities outside the official labour market done by individuals for their own household or for others"); Duncan Ironmonger, *Counting Outputs, Capital Inputs and Caring Labor: Estimating Gross Household Product*, 2 Feminist Econ. 37, 39-42 (1996) (describing unpaid work in categories of productive, non-leisure, non-remunerated activities). For a discussion of unpaid care giving work, see Joan Williams, *From Difference to Dominance to Domesticity: Care As Work, Gender As Tradition*, 76 Chi.-Kent L. Rev. 1441, 1462-66 (2001).

³ See Eisner, *Extended Accounts for National Income and Product*, *supra* note 2, at 1612-13 (significance of understanding value of nonmarket work); Ironmonger, *Counting Outputs, Capital Inputs and Caring Labor: Estimating Gross Household Product*, *supra* note 2, at 38 (public policy implications of defining and valuing activities as work); Timothy M. Sneed, *Time and Public Policy: Why Do We Care and What Instruments Are Needed?*, paper prepared for the conference, "Time Use, Non Market Work and Family Well-Being," Washington D.C.: Nov. 20-21, 1997 (on file at NOW Legal Defense) (avail. at <http://www-cpr.maxwell.syr.edu/faculty/smeeding/papers/timepolicy.pdf>) (cited with permission) (policy issues regarding measurement and valuation of time).

⁴ Statement by the Special Master, September 11th Victim Compensation Fund of 2001, 66 Fed. Reg. 66,273, 66, 274 (Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104) (hereafter "Rule").

I. The Interim Final Rule Undervalues The Real Economic Losses Of Victims Who Worked Full-Time By Excluding Their Unpaid Work, Placing A Heavy Burden On Survivors Of Women Victims.

Under the Interim Final Rule promulgated in December 2001, economic loss for victims does not include the value of unpaid work performed by full-time workers. The Rule only includes as an “economic loss” the value of “replacement services” (a term undefined by the Fund) for the unpaid work performed by victims who had no prior earnings or who worked part-time.⁵ This limitation is arbitrary and unfair, and will lead to inadequate compensation for many of the Fund’s claimants, especially survivors of women victims.

As we have previously discussed, the Fund can avoid a significant devaluation of working women’s lives by using gender-neutral worklife tables, which will not penalize individual women for sex-based predictions about average worklife expectancy; based on our conversations with Fund representatives, we anticipate that such blended worklife tables will be used. However, many women victims’ salaries at the time of their death were depressed because of sex discrimination, including the impact on their earnings of their necessary unpaid work. Their true economic contributions included the hours of unpaid work they performed in addition to their paid employment. The Fund’s failure to compensate the non-market work performed by victims who were employed full-time will seriously undervalue the compensation to many survivors of women victims, raising sex discrimination concerns. This issue can only be dealt with through a calculation of economic loss which includes full-time workers’ unpaid work.

- **Women, Including Full-Time Workers, Perform A Disproportionate Share Of Unpaid Work, Which Depresses Their Income In The Paid Labor Force.**

⁵ Rule, at page 66,286 (compensation for economic losses, including replacement services).

As much as *half of all work is unpaid work*,⁶ much of it care for family members. That work is disproportionately women's work.⁷ Valuing unpaid work is thus a women's issue, because women, especially mothers, will suffer disproportionately if such work is not compensated. Approximately half of all women with children under age eighteen are in the full-time, paid work force.⁸ The pressures of combining paid and unpaid work fall heaviest on single parents, most of whom are mothers, who care for 27% of all American children.⁹

⁶ See Nancy Folbre, *The Invisible Heart: Economics and Family Values* 66 (2001) (unpaid work such as care giving constitutes as much as half of all work); Ann Crittenden, *The Price of Motherhood: Why the Most Important Job in the World is Still the Least Valued* 8 (2001) (half or more of all work is unpaid).

⁷ Measurement of the amount and types of unpaid work are typically based on time-use analyses. The U.S. government has not yet undertaken a national study of time-use, though one is planned for 2003. The U.S. Bureau of Labor Statistics ("BLS") has begun "The American Time Use Survey (ATUS)" which "measures the amount of time people spend doing various activities, such as paid work, childcare, volunteering, commuting, and socializing." See BLS, American Time Use Survey, at <http://www.bls.gov/tus/home.htm> (last visited Feb. 9, 2002) (describing ATUS). ATUS data collection will not begin until January 2003 and the BLS does not expect that analysis can be prepared until mid-2004. See BLS, ATUS: Frequently Asked Questions, at <http://www.bls.gov/tus/atusfaqs.htm#QA4> (last visited Feb. 9, 2002). Other industrialized nations, including Canada and Australia, have already undertaken and continue official measurements unpaid work. See Australian Bureau of Statistics, *2001 Census of Population and Housing, Unpaid Work*, at <http://www.abs.gov.au/> (last visited Feb. 10, 2002) (In 1997, "Australians undertook 19.5 billion hours of unpaid work. . . value[d] at \$240-260 billion . . . about two-thirds [of which] was contributed by women."); Statistics Canada, *Households' Unpaid Work: Measurement and Valuation* (2001) (government's report on measurement and valuation of unpaid work over three decades) (abstract avail. at <http://www.statcan.ca/English/ads/89-549-XPE/hslid.htm>) (last visited Feb. 8, 2002).

Because the United States government has not yet begun an official time-use study, the standard source of data on American time use, including time spent on unpaid work, is American academic research. A major United States time-use study data set, the basis for various data analyses, was recently been completed at the Survey Research Center at the University of Maryland: the Family Interaction, Social Capital, and Trends in Time Use (FISCT) project, completed in 1998-1999. FISCT was led by principal investigators John P. Robinson, Suzanne M. Bianchi, and Stanley Presser. On the FISCT project and its findings, see John P. Robinson, et al., *Family Interaction, Social Capital, and Trends in Time Use (FISCT), 1998-1999*, [Computer file]: ICPSR version, College Park, MD, University of Maryland Survey Research Center [producer], 1999; Ann Arbor, MI, Inter-university Consortium for Political and Social Research [distributor], 2001.

Dr. Liana C. Sayer, currently in a post-doctoral position at the University of Pennsylvania, collaborated with Dr. Bianchi on the FISCT project. From the FISCT data, Dr. Sayer has prepared a table illustrating time spent on categories of unpaid work by women and men, divided by part-time or unemployed work vs. full-time work status. See Liana C. Sayer, Table 1, *Women's and Men's Hours per Day in Nonmarket Tasks by Employment Status, 1998* (prepared 2002) (attached to this memorandum and on file with NOW Legal Defense) (women perform more unpaid work than similarly employed men, whether unemployed, part-time or full-time employed).

⁸ See Crittenden, *The Price of Motherhood*, *supra* note 6 at 18 (full-time work defined as 35 hours or more of paid employment each week).

⁹ See Crittenden, *supra* note 6, at 23 (pressures on single mothers who perform both paid and unpaid work).

Women face a wage gap in their paid employment when compared to men in part because of these substantial unpaid work responsibilities.¹⁰ Careers demanding over time and long hours are typically male-dominated, and pay higher wages than those of female-dominated jobs.¹¹ Thus working women--especially mothers-- face lower pay in the labor market in part because they must perform so many necessary, unpaid tasks for their families, work which excludes them from many higher paying jobs.¹² The U.S. Department of Labor has noted the difficulties faced by working women with family care giving tasks, requiring them to make many accommodations to their working lives.¹³ Women with significant family responsibilities cannot become the “ideal” full-time workers who command the highest salaries: their reduced work experience and wages during periods when they have high unpaid work duties leads to a work history which makes it more difficult for them to later obtain high wages.¹⁴ Professional women on the so-called “mommy track” may manage to work full-time and perform needed unpaid work but have foregone the wages, job security and economic growth potential of a more lucrative professional career, and thus experienced a significant reduction in the value of their present paid employment and future economic potential.¹⁵ Mothers of all skill and education levels

¹⁰ See U.S. Department of Labor, Chapter 2, *Futurework: Trends and Challenges for Work in the 21st Century* (1999) (avail. at <http://www.dol.gov/asp/futurework/report.htm>) (last visited Feb. 8, 2002) (analyzing wage gap between women and men).

¹¹ See, e.g., Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to do About It* (2001), esp. Ch. 3 (“Deconstructing the Ideal-Worker Norm in Market Work”).

¹² See, e.g., Williams, *Unbending Gender*, *supra* note 11, at 2 (full-time jobs requiring extensive overtime exclude 93% of all mothers).

¹³ U.S. Department of Labor, Chapter 2, *Futurework: Trends and Challenges for Work in the 21st Century*, *supra* note 10 (noting that working women have disproportionate care giving duties, and reporting that half of all workers with care giving responsibilities had to make changes at work to accommodate care giving, such as coming in late or leaving early, taking part-time work, or leaving work during the day).

¹⁴ See generally Crittenden, *The Price of Motherhood*, *supra* note 6; Williams, *Unbending Gender*, *supra* note 11, esp. Ch. 3 (“Deconstructing the Ideal-Worker Norm in Market Work”).

¹⁵ See, e.g., Joan Williams, *Market Work and Family Work in the 21st Century*, 44 *Vill. L. Rev.* 305, 313-14 (1999) (“mommy-track” for working mothers). This “forebearance loss” is frequently valued in divorce and wrongful death litigation in assessing the true cost of a career woman’s performance of unpaid work. Communication with Dr. Thomas R. Ireland, Feb. 8, 2002. For discussion of valuation problems associated with women who invest in unpaid work rather than development of a paid career, see Thomas R. Ireland, “Valuing Homemaker Production by Implied

suffer from the “motherhood penalty”: lower wages paid to women who have significant household and family responsibilities.¹⁶

In addition, discrimination against women, especially pregnant women and mothers, lowers their wages and dims their career prospects.¹⁷ The U.S. Department of Labor notes that this wage gap was caused by and will persist because of sex discrimination and “segregation of women in certain occupations and industries.”¹⁸ Discrimination in many cases compounds the lower pay working women receive due to their unpaid work obligations.

Although working women receive lower wages than men, they typically work longer hours: this is why counting their work correctly is so important. Studies show that working mothers work on average more than eighty hours a week, when their unpaid work is counted; more than nearly all working Americans.¹⁹ Time-use analyses illustrate the gulf between the amount of unpaid work performed by full-time working women and men. According to FISCT data from 1998, full-time

Opportunity Cost,” in Thomas R. Ireland & Thomas O. Depperschmidt, eds., *Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption* 143-57 (1999).

¹⁶ See Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 *Amer. Sociological Rev.* (2001) (mothers earn less than men and women without children for reasons including discrimination against mothers and mothers’ trading off higher wages for “mother-friendly” jobs permitting them to provide family care). The U.S. Department of Labor reports that “about 20 to 25 percent of employed mothers would work longer hours if they did not have childcare constraints.” See U.S. Department of Labor, Chapter 2, *Futurework: Trends and Challenges for Work in the 21st Century*, *supra* note 10.

¹⁷ See U.S. Department of Labor, Chapter 2, *Futurework: Trends and Challenges for Work in the 21st Century*, *supra* note 10 (wage gap between women and men attributable to women’s reduced work experience due to unpaid work responsibilities, and to discrimination against women generally); Williams, *Market Work and Family Work in the 21st Century*, *supra* note 15, at 311-14 (wage gap between men and women, and between mothers and other workers). On the wage gap for mothers, see, e.g., Folbre, *The Invisible Heart*, *supra* note 5, at 34-35 (having children tends to decrease women’s earnings); see generally Budig & England, *The Wage Penalty for Motherhood*, *supra* note 16 (mothers earn less than men and women without children for reasons including discrimination against mothers and mothers’ trading off higher wages for “mother-friendly” jobs permitting them to provide family care).

¹⁸ U.S. Department of Labor, Chapter 2, *Futurework: Trends and Challenges for Work in the 21st Century*, *supra* note 10.

¹⁹ Crittenden, *The Price of Motherhood*, *supra* note 6, at 22 (citing time-use literature). There is an extensive academic literature on how Americans spend their time on both paid and unpaid work. In addition to the FISCT work discussed *supra* note 5, see, for example, papers presented at the *Time Use, Non-Market Work, and Family Well-being Conference*, co-sponsored by the U.S. Bureau of Labor Statistics and the MacArthur Network on the Family

working women spend 23.1 hours a week on unpaid work, including housework and child care, as compared to 17.5 hours a week for full-time working men.²⁰ Full-time working women thus perform on average approximately 290 more hours of unpaid work than men each year. (The gender gap is even greater for part-time and unemployed women. They spend an average of 37.1 hours a week on non-market work, compared to 21.7 for men in this category.²¹)

Women's disproportionate performance of unpaid work, and the significance of that work to governments' policy making, has long been recognized by the international community. International attention to this issue is relevant because the September 11th tragedy was one of global proportions, creating victims from dozens of nations. Americans and citizens of other nations alike are eligible for the Fund's compensation.²² There has been tremendous international interest in the implications of nations' continued devaluation of women's unpaid work in such varied contexts as macroeconomic valuations, tax policies, and anti-poverty programs.²³ This global interest is shared by the United States, as

and the Economy (Washington, D.C., Nov. 20-21, 1997) (avail. at <http://www.olin.wustl.edu/macarthur/conference/conference-index.htm>) (last visited Feb. 6, 2002).

²⁰ Liana C. Sayer, Table 1, *Women's and Men's Hours per Day in Nonmarket Tasks by Employment Status, 1998* (prepared 2002) (attached to this memorandum).

²¹ See *id.* Sayers, Table 1 (attached).

²² See September 11 Victim Compensation Fund of 2001, 49 U.S.C. § 40101 (2001), at tit. 4, § 405(c) (definition of claimant not restricted to American citizens or residents).

²³ For example, Canada has identified women's unpaid work as an area for increased government attention and policy action. See Status of Women Canada, *Gender Equality, Development and Peace for the 21st Century: Canada's National Response to the UN Questionnaire on Implementation of the Beijing Platform for Action* (2000) 39-42 (discussing government strategies towards remedying economic consequences of women's unpaid work and impact of unpaid work on their paid labor force participation and earnings) (avail. at <http://www.swc-cfc.gc.ca/beijing5/quest-e.html>) (last visited Feb. 8, 2002). Canada has provided official estimates of the monetary value of unpaid work since 1978, and begun time use surveys in 1986; more recently it has valued the nation's unpaid work. See Statistics Canada, *Households' Unpaid Work: Measurement and Valuation* (2001) (government's report on measurement and valuation of unpaid work over three decades) (abstract avail. at <http://www.statcan.ca/English/ads/89-549-XPE/hslid.htm>) (last visited Feb. 8, 2002). See also Isabella Bakker, *Unpaid Work and Macroeconomics: New Discussions, New Tools for Action* (1998), avail. at <http://www.swc-cfc.gc.ca/publish/research/uwork-e.html> (Canadian economy includes unpaid work).

On the United Nations' long-standing attention to unpaid work and concern about nations' policies towards greater recognition of its worth, see, for example, the Platform for Action, § 206, f, g, *Report of the Fourth World Conference on Women* (Beijing, Sept. 4-15, 1995) (unpaid work by women as key area for policy intervention by national governments); Nairobi Forward-looking Strategies for the Advancement of Women, ¶ 121, *Report of the*

evidenced by its involvement in the United Nations' World Conferences on Women, and its support for implementing in U.S. federal programs the U.N. Conferences' official goal of emphasizing a gender perspective in all economic policies, institutions and questions of resource allocation.²⁴) Thus, in order to meet the Fund's goal of fully and fairly compensating the victims, the Fund should consider the international community's recognition that unpaid work is an important economic issue that must be considered in government policy making.

- **The Disparate Impact On Women Of The Fund's Exclusion Of Unpaid Work From Economic Losses Raises Legal Concerns.**

Several legal issues are raised by the Fund's exclusion from economic losses of all workers' unpaid work, and the special penalties this will impose on survivors of women victims. First, by failing to treat all the September 11 victims equally in this respect, the Fund will not accomplish Congress' mandate of construing economic losses with reference to state law.²⁵ Under New York State's wrongful death law, for example, plaintiffs may recover all "fair and just compensation for the pecuniary injuries resulting from the decedent's death."²⁶ As noted *infra*, courts in New York and elsewhere routinely include as economic losses the loss of unpaid work, whether or not the decedent worked full-time.

World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace (Nairobi, July 15-28, 1985) (Priority attention should be given to creation of shared parental responsibilities and household tasks between women and men, as "conducive to the attainment of women's and men's self-reliance and to the development of future human resources."); and see generally the discussion in Swibel, *supra* note 2, at Part III (discussing United Nations attention to recognition of unpaid work by women).

²⁴ See U.S. President's Interagency Council on Women, *A Five-Year Review of Federal Programs Benefiting Women and New Initiatives as a follow-up to the UN Fourth World Conference on Women* (March 2000) (avail. at <http://secretary.state.gov/www/picw/2000commitment/2000commitment.html>) (last visited Feb. 8, 2002); see generally, on U.S. government's participation at Beijing Conference 1995 and Beijing Plus Five Conference 2000, http://secretary.state.gov/www/picw/beijing/women2000_highlights.html) (last visited Feb. 8, 2002).

²⁵ See September 11 Victim Compensation Fund of 2001, 49 U.S.C. § 40101 (2001), at tit. 4, § 402(5) (definition of "economic loss" by reference to extent of losses "allowed under applicable State law").

²⁶ N.Y. EST. POWERS & TRUSTS LAW § 5-4.3(a) (McKinney 2001).

Moreover, the Fund’s differentiation between full-time workers and all other claimants as to compensation of unpaid work as economic loss also raises constitutional equal protection concerns. Under the Equal Protection Clauses of the United States and New York Constitutions (U.S. Const amend. XIV; N.Y. Const. art. I, § 11), where the government treats non-protected groups differently, rational basis scrutiny applies. As discussed, the Fund’s treatment of full-time workers will have a significant disparate impact on women, though the policy is neutral as to gender on its face. Yet we question whether the Fund’s treatment of full-time workers can withstand even rational relationship review, since there is no legitimate governmental purpose to the Fund’s denying victims’ families of the full value of their work, especially when in private litigation, unpaid work is routinely valued as an economic loss (see *infra*).

In addition, because the Interim Rule’s denial of compensation for unpaid work by full-time workers will disparately affect women, the goals of federal anti-discrimination law are implicated. The United States Supreme Court made clear in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), that federal anti-discrimination law prohibits even facially neutral employment practices if those practices maintain the status quo of prior discrimination and have a disparate impact on protected groups, including women. Congress crafted anti-discrimination law to strike against an “entire spectrum of disparate treatment of men and women resulting from sex stereotypes . . . [federal anti-discrimination law] subjects to scrutiny and eliminates . . . irrational impediments to job opportunities and enjoyment which have plagued women in the past.”²⁷ The denial of full-time workers’ total economic loss will fall

²⁷ See *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted); Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, provides that “it shall be an unlawful employment practice . . . to discriminate against any individual . . . because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1).

heaviest on survivors of women victims perpetuates stereotypes about the economic value of unpaid, “second shift” work, which devalue women’s contributions to American society.

II. Fair Valuation Of All The September 11th Victims’ Economic Losses, Including Unpaid Work, Can Be Accomplished In An Efficient, Accurate And Non-Discriminatory Manner.

The value of the unpaid work performed by all victims of September 11th can be captured fairly and without unduly complicating the Fund’s compensation process. The Fund has undertaken to devise formulae to value replacement services for all claimants but full-time workers. When it determines a fair method of measuring and valuing the replacement services loss for these claimants, it need only extend that approach to cover claimants who have lost full-time workers to the tragedy. Importantly, full-time working women and men are engaged in the *same types* of unpaid work for their families as part-time or unemployed women and men, although on average they spend fewer hours on such work.²⁸

Full-time workers are more likely than others perform unpaid work of which high-quality replacement services are especially difficult and expensive to obtain. Some unpaid work, such as household repairs, can--at a cost--be relatively easily delegated to others, through the purchase of replacement services. Other kinds of unpaid work are very hard to delegate or replace with a high quality equivalent, and these are disproportionately performed by women, including full-time working women.²⁹ Examples of these types of unpaid work are household management,³⁰ emergency sick

²⁸ See Sayers, Table 1 (attached) (indicating that full-time workers like part-time or unemployed persons perform non-market tasks as housework, child care and shopping and other services).

²⁹ It is easier to obtain in the market high quality services for such tasks as cleaning a yard, than for the work of caring for a sick child or parent; women are more likely than men to be responsible for such less-easily delegable tasks. Communication with Dr. Nancy Folbre, Feb. 7, 2002. See, e.g., Suzanne M. Bianchi & Liana C. Sayer, *Are Parents Investing Less in Children? Trends in Mothers’ and Fathers’ Time With Children*, paper presented at the annual meetings of the American Sociological Association, Anaheim, CA: August 18-21, 2001 (on file at NOW Legal Defense) (mothers invest considerably more time in child care tasks than men).

³⁰ Household management work typically is performed by employed parents regardless of whether or not they are employed full-time: replacing the time and attention spent on tasks such as planning meals, securing and management of necessary household cleaners, babysitters, and other services (including child care and back-up child

care,³¹ and the development and maintenance of children's social relationships.³² Yet this distinction will exist whether the victim worked exclusively in the home, or had part-time or full-time employment.

What is important is that the Fund, recognizing that all women and men may perform extensive amounts and kinds of unpaid work for which replacement services are necessary, whether or not they worked full-time, and design a fair compensation approach for replacement services applicable to any claimant.

Due to the widespread acknowledgement of the necessity and value of unpaid work to a functioning household or family, it is accepted practice for courts to compensate wrongful death victims, including full-time working women and men, for the value of replacement services for their unpaid work.³³ In wrongful death cases, "economic loss estimates *typically* include a value for household work which the deceased individual would have performed for the benefit of his or her dependents."³⁴

This is true regardless whether the adult worked full-time or not: in such cases, the loss of unpaid work, especially child care, constitutes a significant economic loss.³⁵

care) can be replaced through the market, but at significant cost. The loss of this work must be considered as part of economic losses.

³¹ Parents employed full-time also need to stay home with children – or to care for elders – when they become ill. Emergency child care for sick children or assistance for seniors experiencing a major life transition are typical unpaid services faced by full-time working women and men: replacement services are very difficult to obtain and the loss of this work has real economic value.

³² For example, the time spent bringing up children who are both socially well-adjusted and intellectually challenged, including many unpaid tasks which are not delegable to paid substitutes, such as volunteering at the child's school, and so this work remains the province of full-time working parents. See Ann Bookman, *Who's Caring for Community?: Rethinking Our Lives As Workers, Family Members, Neighbors and Citizens* (forthcoming 2002).

³³ See, e.g., *Cramer v. Kuhns*, 213 A.D. 2d 131, 139 (N.Y. 1995) ("We have long considered an injured plaintiff's loss of household services to be a quantitative economic loss separate and apart from pain and suffering."); *DeLong v. Cty. of Erie*, 89 A.D. 2d 376 (N.Y. 1982), aff'd 60 N.Y.2d 296 (1983) ("It has long been recognized that pecuniary advantage results . . . from parental nurture and care, from physical, moral and intellectual training, and that the loss of those benefits may be considered within the calculation of 'pecuniary injury'.") (citations omitted). The federal courts have also recognized that the loss of a working woman's unpaid household services is a recoverable, economic loss. See, e.g., *Winbourne v. Eastern Airlines*, 758 F.2d 1016 (5th Cir. 1984) (decedent wife's salary as teacher and unpaid household services together comprised economic loss).

³⁴ See Thomas L. Wyrick, *The Economic Value of Parental Guidance*, J. of Legal Econ. 81, 81 (July 1993).

³⁵ Wyrick, *id.*, at 81-83 (care and supervision of children as economic loss).

In litigation, triers of facts' methods of valuing unpaid services are not always explicit.³⁶

However, a very large body of legal-economic literature shows that unpaid services are routinely valued in calculating economic losses, whether the victim worked full-time, part-time, or was not employed.³⁷

Through estimates of the amount and kind of unpaid work lost, and the costs of replacement services, information readily available by consulting with victims' families and using solid academic research and models as to the value of replacement services, the Fund will be able to fairly and accurately offer compensation for these losses.

The most accurate approach to valuing the unpaid services of full-time workers would be to determine how much time the victim spent on various unpaid services and assign that time and those services a dollar value.³⁸ This method best accomplishes the Fund's purpose of compensating victims' for their losses based on consideration of their individual circumstances. The dollar value should reflect as much as possible the real worth of quality replacement services, and the costs of obtaining adequate replacements, either through purchasing services in market or through a survivor's changes in employment to be able to provide the same services.³⁹ This process can be complex, but the Fund has

³⁶ *But see generally* Wyrick, *id.*, for a discussion of the approaches to valuation of unpaid work taken by forensic economists in litigation, and arguing that it is possible to value and create fair awards even for the loss of harder-to-value unpaid work such as parental guidance.

³⁷ *See, e.g.*, Eisner, Extended Accounts for National Income and Product, *supra* note 2, at 1626-27 (methods of valuing nonmarket work). A comprehensive discussion of approaches to and issues involving valuation are presented in a recent volume of papers edited by Thomas R. Ireland and Thomas O. Depperschmidt., *Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption* (1999).

³⁸ On measurement of replacement costs, see generally Thomas R. Ireland and John O. Ward, *Replacement Cost Valuation: Conceptual Questions and Measurement Problems*, in Thomas R. Ireland & Thomas O. Depperschmidt, eds., *Assessing Family Loss in Wrongful Death Litigation: The Special Roles of Lost Services and Personal Consumption* 131-42 (1999). In the "replacement services" approach of valuation, hours a victim would have spent on unpaid work are counted and a value per lost hour assigned. *See* Eisner, Extended Accounts for National Income and Product, *supra* note 2, at 1626; Ironmonger, *supra* note 2, at 39-42.

³⁹ *See generally* essays in Ireland & Depperschmidt, *Assessing Family Loss in Wrongful Death Litigation*, *supra* note 37. *See id.*, Thomas R. Ireland, "Economic Loss in the Case of a Full-Time Mother and Homemaker: When Lost Services are the Only Pecuniary Loss," at 30-31 (replacement services for "mommy track" worker who was not able to maximize contributions to either unpaid work or paid work due to problems of combining both types of work); *id.*, J.

already undertaken to compensate part-time and unemployed victims for the loss of their unpaid work. To cover additional claimants, it will simply need to extend its analyses to full-time workers as well.

A less accurate approach would be to simply assign a lump sum value for the unpaid services of full-time workers, based, for example, on the average amount of time spent by all such workers on this work. A lump sum approach will grossly undervalue the work of many individuals, and overvalue the work of others. However, it would at least provide some compensation for this important economic component of economic loss, which the Interim Rule fails to do. One approach would be to blend calculations of average unpaid work performed by working women and men, to create a single sex-neutral figure. This would discriminate against working women by denying them full compensation for their work: to avoid this result, the Fund could use a figure derived from statistics reflecting the typical unpaid work performed by working *women*. (Data on average time spent by Americans on unpaid work is typically presented by sex, and this information is readily available.⁴⁰) Using estimates of women's unpaid work will at least approximate many women's experience, with little risk of undervaluing working men's compensation.

III. Conclusion

The omission from the Interim Rule of compensation for the value of the unpaid work performed by September 11th victims who worked full-time deprives their survivors of the worth of economic losses to which they would otherwise be entitled in courts of law. Moreover, it de-values the enormous contributions to the American economy and to individual families made by full-time working women who put in a "second shift" providing necessary services to their families and communities for no pay.

Thomas Romans & Frederick G. Floss, "*Evaluation of Homemaker Services: Replacement Cost, Opportunity Cost or Something Else?*," at 65-71.

⁴⁰ The FISCT project, like all leading academic studies of time-use, tracks non-market work and other activities by gender. See Sayers, Table 1 (attachment).

The Fund may not be able to compensate survivors of working women for the sex discrimination they may have suffered in the paid labor market-- the “glass ceiling,” the “motherhood penalty,” segregation into “pink-collar” jobs--and the low pay which likely resulted. What it can do is avoid doubly penalizing working women, especially those who had significant care giving responsibilities, by stripping their survivors of the real value of their economic contributions through an exclusion from Fund compensation of the value of their unpaid work.

We are available to discuss this issue at greater length, and appreciate your interest in the subject.

Sincerely,

Martha F. Davis, Legal Director

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Cc: Deborah Greenspan by E-Mail

Table 1. Women's and Men's Hours per Day in Nonmarket Tasks by Employment Status, 1998

	Women		Men	
	Not Employed or Part-time Employment	Full-time Employment	Not Employed or Part-time Employment	Full-time Employment
All Nonmarket Work	5.3	3.3	3.1	2.5
Housework	2.8	1.8	2.3	1.4
Meal preparation	0.8	0.6	0.3	0.3
Cleaning ^a	1.3	0.8	0.6	0.4
Male/Shared ^b	0.7	0.4	1.4	0.7
Child Care	1.4	0.6	0.4	0.4
Daily Child Care ^c	0.9	0.5	0.3	0.2
Helping / Teaching Child Care ^d	0.5	0.1	0.1	0.2
Shopping & Services	1.2	0.9	0.4	0.6
Shopping	0.6	0.5	0.1	0.3
Services	0.2	0.1	0.1	0.1
Travel, Services	0.4	0.3	0.2	0.2
N	210	346	77	354

a Cleaning activities include housecleaning, laundry and ironing, and meal clean-up

b Male /shared activities include outdoor chores, gardening, pet / animal care, house and car repairs and maintenance, bill paying, other general household chores

c child care

d Helping / teaching child care activities include talking or reading, teaching and helping, indoor play, and outdoor play

Source: 1998-99 Family Interaction, Social Capital, and Trends in Time Use Study (Bianchi, Robinson and Sayer, 2001)